

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

STEVEN R. KINCAID,)
)
 Plaintiff,)
)
 v.)

Civil Action No. 04-11522-WGY

BANK OF AMERICA)
 CORPORATION,)
)
 Defendant.)

PLAINTIFF'S MOTION FOR SANCTIONS BASED
ON BANK'S UNJUSTIFIED FAILURE TO MAKE
CRITICAL FED. R. CIV. P. 26(a)(1) DISCLOSURES

Pursuant to Fed.R.Civ.P. 37(c)(1), plaintiff ("Mr. Kincaid") hereby moves

a. for a ruling: (i) that defendant (the "Bank") was required, in its November 30, 2004 Initial Disclosures, to identify Alec Kotopoulos as an "individual likely to have discoverable information that the disclosing party may use to support its claims or defenses" and to identify the Bank's Personnel Center's Performance Management Memorandum regarding Mr. Kincaid (BA 110-115) as a "document that the disclosing party may use to support its claims or defenses"; (ii) that the Bank's failure to provide such identification respectively of Mr. Kotopoulos and of the Personnel Center Memorandum constituted violations of Fed.R.Civ.P 26(a)(1); and (iii) that such violations were "without substantial justification" and severely prejudiced Mr. Kincaid; and

b. for an order imposing, in light of the foregoing violations, the following sanctions on the Bank:

an instruction to the jury informing the jury of the Bank's foregoing violations;

ii. an order striking Alec Kotopoulos' deposition testimony from the Bank's summary judgment papers;

iii. an order precluding the Bank from making any use at trial of Mr Kotopoulos or of the Personnel Center Memorandum; and

iv. an order requiring the Bank to pay Mr. Kincaid an award of reasonable attorney's fees and expenses plus a penalty appropriately calculated to deter comparable misconduct by the Bank in the future

The grounds for this Motion are set out in Mr. Kincaid's Memorandum submitted herewith.

Dated: December 23, 2005

Respectfully submitted,



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Attorney for Plaintiff

Certificate of Service

I hereby certify that I have this day served the foregoing by causing true copies thereof to be transmitted electronically and mailed, first class postage prepaid, to Siobhan M. Sweeney, Esq., Edwards & Angell, LLP, 101 Federal Street, Boston, Massachusetts 02110 and Mark A. Pogue, Esq., Edwards & Angell, LLP, 2800 Financial Plaza, Providence, Rhode Island, 02903, attorneys for defendant.

Dated: December 23, 2005


David J. Fine